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IN THE

Supreme Court of the United States.

October Term, 1953.

No. 471.

FAMOUS ROGERS,
Petitioner,

v.

UNITED STATES LINES.

BRIEF FOR RESPONDENT ON PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

In view of the grant of certiorari by this Honorable Court in *Alaska S. S. Co. v. Petterson*, No. 287, October Term, 1953, respondent herein, United States Lines, does not oppose the grant of certiorari in the present case.

In taking this position, respondent does not concede that there is a conflict between the decision of the Court of Appeals for the Third Circuit in the present case, and the decision of the Court of Appeals for the Ninth Circuit in the *Petterson* case, as that conflict is attempted to be delineated in the present petition. Nor does respondent agree that the present petition states accurately the basic question presented in this case. However, as respondent sees it, both the present decision and the *Petterson* case involve a common and important question of law, which is:

May a longshoreman employed by an independent contractor circumvent the purpose of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C., § 901 et seq., by securing from a shipowner an award of damages for injuries occasioned by the fault of the longshoreman's own employer?

Both in the present case, and in *Petterson*, the device by which this circumvention of the Compensation Act was sought was a perversion of the doctrine of *Seas Shipping Company v. Sieracki*, 328 U. S. 85. In *Sieracki*, it was held that a shipowner warrants to employees of a stevedore contractor the seaworthiness of equipment furnished by the shipowner for the use of the contractor's employees. In *Petterson*, and in the present case, it is contended that the shipowner likewise warrants the seaworthiness of equipment furnished by the contractor for the use of its employees, irrespective of whether the shipowner knew of the presence of such equipment aboard its vessel, had any control over its use, or played any part in its selection or installation. The practical implications of what we believe is this misconception of the *Sieracki* doctrine are important and manifest.

Regardless of the reasoning employed, the Ninth Circuit in *Petterson*, and the Third Circuit in the present case, have reached opposite conclusions on this point. The Ninth Circuit has held, in effect, that the *Sieracki* doctrine applies to the aforementioned circumstances. The Third Circuit has reached a result to the contrary, and respondent maintains correctly so.

Because of the contrariety of results on this basic question between the *Petterson* decision and the present case, and the importance of the question involved, respondent believes that it would be consistent with orderly procedure, and conducive to proper decision if the present case were to be heard and decided along with the *Petterson* case. For this reason alone, respondent does not oppose the granting of the present petition.

In view of the position which respondent here takes, we find it unnecessary presently to discuss the various arguments advanced by petitioner. We would emphasize, however, that respondent by no means concedes that the facts of this case are necessarily indistinguishable from the facts of the *Petterson* case, or that the various reasons and arguments for granting the writ advanced by petitioner are either sound or relevant. We simply refrain from commenting upon them at this stage of the proceedings.

CONCLUSION.

Respondent does not oppose the granting of the petition for certiorari, and if certiorari be granted, respondent urges that the present case be consolidated for argument and decision with *Alaska S. S. Co. v. Petterson.*

Respectfully submitted,

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1953.

No. 471.

FAMOUS ROGERS,

Petitioner,

v.

UNITED STATES LINES.

PETITION OF RESPONDENT FOR LEAVE TO FILE ADDITIONAL BRIEF ON PETITION FOR CERTIORARI, AND FOR EXTENSION OF TIME THEREFOR.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

United States Lines Company, respondent in the above matter which is presently pending before this Court on petition for certiorari, respectfully prays that this Honorable Court grant it leave to file an additional brief in connection with the pending petition for certiorari. In support of the within petition, respondent respectfully avers:

1. On April 5, 1954 this Court announced its decision in the case of *Alaska Steamship Company, Inc. v. Petterson*, No. 287. This opinion was not available for examination by counsel for respondent until April 8, 1954.

2. The decision in the *Petterson* case may be considered by this Court to be determinative of the petition for certiorari in the present case.

3. The respondent-shipowner is not in accord with what it has been advised was the position taken by the petitioner-shipowner before this Court in the *Petterson* case. Counsel for respondent is advised that certain concessions were made in the briefs and oral argument in the *Petterson* case which vitally affected the premises upon which the issues therein were presented to this Court. It is believed that these concessions were inadvertently and incorrectly made, which fact can be demonstrated to this Court if respondent is afforded time within which to prepare, print and present an additional brief herein.

4. Counsel for the respondent in the within matter has been instructed to appear as co-counsel for the petitioner Alaska Steamship Company, Inc. in the preparation and filing of a petition for rehearing in the *Petterson* case.

5. It is not the intention of respondent simply to reargue *Petterson* in the additional brief which it seeks leave to file in the present case, but rather to attempt to demonstrate to this Court that the judgment of the Court of Appeals for the Third Circuit in the present case is correct and that it should not be disturbed.

Wherefore, the respondent, United States Lines Company, respectfully prays that this Honorable Court may grant it leave to file an additional brief in connection with the within pending petition for certiorari, said brief to be filed not later than April 30, 1954.

Respectfully submitted,

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1953.

No. 471.

FAMOUS ROGERS,

Petitioner,

v.

UNITED STATES LINES.

ADDITIONAL BRIEF FOR RESPONDENT ON PETITION FOR CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

In an order entered April 12, 1954 this Court granted leave to the respondent, United States Lines, to file an additional brief on petition for certiorari and granted the respondent until April 30th to file the same in light of the judgment of this Court entered April 5, 1954 in the case of *Alaska Steamship Company, Inc. v. Petterson*, No. 287.

THE FACTS OF THIS CASE.

United States Lines' vessel, "Pioneer Tide" had docked at Philadelphia for the purpose of unloading cargo. To unload the cargo, United States Lines entered into a contract with Lavino Shipping Company, a large concern with extensive business in the Port of Philadelphia. It is conceded that Lavino, the stevedore, occupied the position which the law defines as independent contractor.

Part of the cargo of the "Pioneer Tide" which was to be unloaded consisted of ore which Lavino was paid to unload at a rate of so much per ton.

Hereinafter, we will refer to the independent contractor as "the stevedore" and to the employees of the independent contractor as "the longshoremen". We believe that nomenclature will be technically correct.

The longshoremen employed by the stevedore began to unload the ore by means of large shoreside cranes. United States Lines had no connection with the cranes, the pier or the men who operated the cranes except that it paid the pier owner wharfage for the privilege of having its vessel alongside the pier. During the unloading process a time came when the large shoreside cranes could no longer work effectively to unload the thin layer of ore which remained at the bottom, the sides and corners of the ship's holds.

The large shoreside crane which had been used during the early part of the unloading operated on railroad tracks. The legs of the crane were wide enough so that the crane spanned two sets of rails and freight cars were placed under it two abreast on the pier to receive the ore. When the use of the shoreside cranes was discontinued as the unloading operation neared its end, Lavino wished to continue to load into the two lines of freight cars.

The stevedore therefore sent on board the ship its own rigging gang. The wire runner on the ship's winch was long enough to unload ore into the line of freight cars nearest the ship and one ship's boom and one set of winches was being so used at the time of the accident which gave rise to the present litigation.

The wire runner on the ship's winch was designed to operate with the ship's boom. The boom did not reach out to the second line of railroad cars. Therefore, the stevedore availed itself of a tower on the pier which was beyond the second line of railroad cars. The tower was equipped with a pulley. The ship's runner was not long enough to

reach out to this tower and back into the vessel's hold. The stevedore therefore put one boom out of the way and removed the ship's wire runner. It substituted another runner which ran to the pulley or block on the shoreside tower. With this arrangement it was possible to move the loaded tubs or buckets from the ship's hold and unload them into cars in the second line. Thereafter unloading operations continued in this way and it was during this period of time that the petitioner, Rogers, a longshoreman in the employ of the stevedore was injured.

The contention of the plaintiff was that the wire runner which the stevedore had installed, while longer than the one which had been a part of the ship's equipment, was nevertheless not long enough for the use to which it was put by the stevedore. The defense of United States Lines was twofold. It took the legal position that even if the jury believed the plaintiff's contention it was not responsible to the injured longshoreman if the jury found that the runner which the plaintiff claimed was too short had been supplied by his own employer, the stevedore. It also offered evidence to prove that the cause of the accident was the improper manner in which the winch was operated by the stevedore and its employees.

As pointed out in the opinion of the Court of Appeals, the condition of a runner too short for the use to which it was put by the stevedore was admittedly not created by the ship. The runner was owned, produced and fastened to the ship's winches by the stevedore who was in charge of and performing the unloading operation and there is no indication on the record at all that the ship knew of the change in runners or sanctioned its use. There is in fact no evidence as to how long prior to the accident this particular method of unloading had been used. The position of United States Lines in the Courts below was that even if the jury had believed plaintiff's contention, it was not responsible to the injured longshoreman since if the equipment was defective as the longshoreman contended it had

been furnished by his employer and he should look to his employer for his remedy.

The verdict of the jury was rendered in favor of United States Lines Company. It was a general verdict so that it is impossible now to state upon which ground the jury found for United States Lines.

After the jury's verdict the plaintiff moved for a new trial, which was denied by the District Court. Thereafter, an appeal was taken to the Court of Appeals for the Third Circuit and the error assigned there was the following excerpt from the charge of District Judge McGranery to the jury:

> "(113) If you find that the runner operated by Lowry at the forward end of No. 3 hatch was furnished and rigged by Lavino and was too short for the purpose for which it was used, and that the accident was due to the use of a runner that was too short your verdict must be for the defendant."

The Court further charged:

> "(105a-106a) But it does become important if it were the land boom, because there Lavino, his own employer, supplies that wire, and if that were the one, members of the jury your verdict must be for the defendant."

The longshoreman contended that the above quoted portions of the charge were erroneous because they "exculpated the defendant shipowner from liability for an unseaworthy appliance which, although intermediately provided by the stevedores (sic) was incorporated into and attached to the vessel's unloading gear. . . ."

The argument for Rogers in the Court of Appeals was based primarily upon language taken out of context from this Court's opinion in *Seas Shipping Company v. Sieracki*, 328 U. S. 85.

In answer to Rogers' contention the Court of Appeals for the Third Circuit said (at 205 F. 2d 57-58):

"Admittedly then, the alleged unseaworthy condition was not created by the ship. The runner was owned, produced and fastened to the winch by Lavino, which was in charge of and performing the unloading operation. And there is no indication that the ship sanctioned its use or even knew of its existence. The statement that the vessel adopted the runner as an appurtenance is simply not justified by the record. In accordance with the well accepted practice the discharge of the cargo had been turned over to Lavino Company, an experienced master stevedore concern. The latter had taken the assignment and proceeded to carry it out. In the course of so doing and for its purposes it hooked up one of its own wires and thereafter used it in connection with the other rigging. While there is strong evidence of Lavino's negligence through its employees, particularly the winch operator, the resolution of that question is not pertinent to this appeal. Since the wire alone or the manner in which it was handled, or both, caused plaintiff's hurts and since under the facts the presence of that wire cannot be construed as appellee's responsibility this judgment should not, for the reason urged, be disturbed. Lopez v. American-Hawaiian Steamship Company, 201 F. 2d 418 (3 Cir. 1953), cert. denied June 8, 1953 [345 U. S. 976]."

Solely to complete the factual picture of what occurred it can be stated that Rogers was hurt when his fellow-longshoremen, also employed by the stevedore, operated one of the ship's winches so that the wire runner attached to the winch drum ran out to its end. The winch was not stopped at that point but the operator permitted the drum to continue to revolve. That reversed the direction of movement of the wire runner and the tub or bucket attached to that runner reversed its direction and struck Rogers.

SUMMARY OF ARGUMENT.

1. Principles of vicarious liability have never been extended in either the maritime or terrene law to make the owner of premises responsible to an employee of an independent contractor for a negligent act of the employer which caused injury to his servant. A person who is in fact an independent contractor is always responsible for injuries caused by his negligence or that of his employees.

In certain narrow and well-defined cases the owner of the premises may also be held responsible to third persons injured by reason of the work which he has ordered performed. No decided case in any field of the law extends even those few and narrow exceptions so as to make the owner responsible to an employee of the contractor for negligence of the contractor.

2. The concept of a duty on the part of a shipowner to furnish to the stevedore and his longshoremen a vessel which is seaworthy can be rationalized only so long as it pertains to gear and apparatus which the shipowner furnishes for a particular use to the stevedore and his longshoremen. We suggest that it cannot be rationalized where the duty is imposed as to the equipment which is furnished to the longshoremen by his own employer. No rule of law in any other field goes so far and the doctrine for which the petitioner contends would abrogate not only well-defined rules of law applicable to the independent contractor, it would also abolish completely all those reciprocal rights and duties which are an integral part of the law of master and servant.

3. The proposition for which the petitioner contends would nullify the Longshoremen's and Harbor Workers' Act and stultify it to the point where the stevedore could sue and recover against the shipowner for the stevedore's own negligence.

4. *Alaska Steamship Company, Inc. v. Petterson*, No. 287, October Term, 1953, affirmed April 5, 1954, was wrongly decided by the Court of Appeals for the Ninth Circuit in its decision, 205 F. 2d 478. All that was considered there were contentions as to proof of unseaworthiness and control of that portion of the ship upon which the injured stevedore was working. Neither of these points reaches the fundamental issue.

ARGUMENT.

I. Principles of Vicarious Liability Have Never Been Extended So Far as to Make an Owner of Premises Responsible in Damages to the Employee of a Contractor Injured Through the Negligence of His Employer.

Vicarious liability is a concept which originated in *Jones v. Hart,* 2 Salk. 441 (1698), and has been firmly imbedded in our law since *Brucker v. Fromont,* 6 T. R. 659 (1796). The doctrine of vicarious liability for which the petitioner contends would carry that doctrine far beyond any application of it heretofore known. More than that, it extends vicarious liability without any relation to the reasons which called the doctrine into existence.

As we understand the reasons underlying the rule of vicarious liability, they have their first roots in the so-called entrepreneur theory.

That theory, or test, is that if the tort feasor was himself an entrepreneur furthering his own ends and the person for whom he worked under a contract was interested in the result rather than the method by which the result was reached, the tort feasor was himself an entrepreneur and responsible for his acts and the acts of his servants. The person with whom he had contracted to perform the work was not responsible.

In 1929, the present Mr. Justice Douglas [1] concluded that there were four earmarks which determined whether the person who employed the contractor or the contractor himself would be held liable under the doctrine of vicarious liability. These were control, ownership, losses and profits. Losses due to casualty were to be placed upon the one who, as between contractor and contractee, had more of these earmarks than the other.

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1. *Vicarious Liability and Administration of Risk,* 38 Yale Law Journal 584 and 720.

We think it cannot be contradicted that the stevedore in this case, Lavino Shipping Company, is a corporation operating with an eye toward profit. If it does not load or unload a particular cargo within the contract price per ton it loses money, and the converse is true. The stevedore was the owner of the runner which was the offending thing here and it exercised control of the way in which, and the methods by which, the unloading operation was to be performed.

Ownership of an offending instrumentality is one of the normal and usual tests in determining the identity of a person responsible in a tort action. No one other than the owner knows the origin and history of the device. No one else has the opportunity to inspect, test and reject a device which is or may be unfit. The person furnishing the device knows the precise use to which it is to be put and the propensities of the men who will use it.

Under the rule for which petitioner contends and which has been promulgated in the Court of Appeals' decision in Petterson, a rigger employed by a stevedore who knowingly selected an improper wire and was later injured by it could recover against the shipowner.

A prime illustration of the importance of ownership in affixing tort liability in a situation having its roots in things maritime would be the familiar in rem liability in admiralty. That concept is by no means peculiar to the maritime law although we use different words to describe it. The person injured upon a public sidewalk looks first to the owner for his indemnity. Where, by contract between an owner and a lessee, the right of possession and control has been transferred, the legal incidence of liability frequently follows to the one who has for the time being the indicia of ownership, i.e., the right to possession and control. "Liability in tort is an incident to occupation or control."[2]

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2. Justice Cardozo in *Cullings v. Goetz*, 256 N. Y. 287, 290.

The position of the petitioner in the present case is that the person who did not furnish, did not own and did not control the offending instrumentality should nevertheless be held liable in a tort action to the servant of the person who did furnish, own and control the offending instrumentality. The petitioner puts his argument as if United States Lines were attempting to avoid some liability which the law placed upon it, but that rationalization begs the question. By all of the normal tests, the law places the responsibility upon the stevedore because he owned and furnished as well as controlled the offending instrumentality.

The problem correctly stated is: What transfers the liability from the stevedore to the shipowner? Under similar circumstances it has been said:

> "Courts normally would not permit a recovery. . . . The function of [stevedoring] has been lopped off [the shipowner's] enterprise and has been allocated to [the stevedore] and has become a part of [the stevedore's] enterprise."[3]

The reason for the rule just mentioned seems to be that risk avoidance, risk prevention, risk shifting and risk distribution can best be performed by the person owning the instrumentality and who directly, or through his servants, controls the method of operation.

We urge that the reasons for imposing liability upon the contractor are as valid today as they were in 1929, and they are as valid whether the business be stevedoring a ship or delivering parcels from a metropolitan department store.

It serves only to confuse logical thought to state the duty, for the breach of which liability is sought to be fastened, in terms of the duty which the defendant might owe to someone in a different class. An automobile owned by an Insurance Company injures two people whose negli-

3. *Douglas, supra,* 38 Yale L. J. 595.

gence cause their own injuries. One of the injured carries an accident insurance policy, the other does not. One will receive compensation for his injury, the other will not. The difference depends upon the relationship.

The American Law Institute, *Restatement of Torts*, Sec. 409, provides that

> "Except as stated in Sec. 410 to 429 the employer of an independent contractor is not subject to liability for bodily harm caused to another by a tortious act or omission by the contractor or his servants."

The exceptions referred to all deal with persons who do not stand in the position of employee of the independent contractor. Those exceptions were devised to protect third persons and deal with situations where the work ordered necessarily involves the very hazard which caused the harm, such as blasting, the creation of a nuisance, violations of statute or ordinance, etc.

We know of no exception to the rule of Sec. 426 of the *Restatement* that one who engages an independent contractor is not liable for the contractor's negligence in performing the operative detail of the work. We can imagine nothing which is more exactly included within the term "operative detail of the work" than owning, furnishing and directing the use of an appliance such as a steel cable.

We have said that it leads to confusion of logic to state a duty in terms which are applicable to someone in another class. The petition for certiorari in this case does just that. It cites this Court's decision in *Mahnich v. Southern S.S. Co.*, 321 U. S. 96 at four different places.

The *Mahnich* case dealt with a suit by an employee against his employer. There is a whole body of law built up in the United States and elsewhere governing the duties as between employer and employee. The Compensation Acts in the various States have suspended the remedies which an injured employee may have against his master for the latter's negligence in that they have provided for a fixed

rate of compensation whether the injury be inflicted as the result of negligence or not. Those same Acts have removed that class of case from the Courts of general jurisdiction and placed the administration of compensation in the hands of Boards, Bureaus and Commissions.

Nevertheless, the mere suspension of the old remedies and the substitution of new has not changed nor repealed the underlying legal rules applicable to the employer-employee relationship. Nothing in the law of master and servant or independent contractor has substituted the owner of premises for the employer. 44 A.L.R. 891.

II. The Concept of a Duty on the Part of a Shipowner to Furnish to the Stevedore and His Longshoremen a Vessel Which Is Seaworthy Can Be Rationalized Only So Long as It Pertains to Gear and Apparatus Which the Shipowner Furnishes for a Particular Use to the Stevedore and His Longshoremen.

We suggest that one of the principal reasons this Court reached the result it did in *Seas Shipping Company, Inc. v. Sieracki*, 325 U. S. 85, was that the shipowner and not the stevedore had supplied the instrumentality and had the opportunity to inspect, care for and repair the appliance or substitute another before use. The shackle in the *Sieracki* case was part of the ship's equipment, furnished by the shipowner for use by the stevedore. That situation is totally different from that of the wire runner in the present case.

In its decision in the *Sieracki* case, this Court held the shipowner liable to an injured longshoreman who had been injured by reason of a defect in gear owned by the shipowner and furnished by him. We can rationalize that result.

In other fields of the law where an owner of premises furnishes an appliance such as a scaffold to an independent contractor with the intent that it shall be used by employees of the contractor, the law will permit a recovery by the injured workman against the owner. The ground for re-

covery is that the thing furnished by the owner was not fit for the intended purpose. Conversely, the law has heretofore been uniform in exonerating the owner where the appliance causing injury was built or furnished by the contractor whose employee was injured.

Distribution of the loss due to industrial injury can be effectually carried out by enforcing against the employer those duties which the law of master and servant places upon it. Prior to passage of the Longshoremen's and Harbor Workers' Compensation Act the Longshoreman sued the stevedore who employed him and recovered in cases such as this. Under *International Stevedoring Company v. Haverty,* 272 U. S. 50, the stevedore was responsible to his employee for negligence. All that the Longshoremen's and Harbor Workers' Act has changed is the remedy. Cf. *Swanson v. Marra Bros.,* 328 U. S. 1. It was done by statute which has been frequently amended as the need for greater benefits was demonstrated.

At the present time, benefits in death and permanent total disability cases are unlimited. The fact that an individual lawyer or Judge may feel the remedies under the Act to be insufficient in a given case is not, we suggest, a proper subject for judicial concern. Too many factors require weighing for the judiciary to reach a correct overall conclusion upon the facts of one particular case, or the visceral reaction which it may engender.

Why should the rule of responsibility in the maritime field be so different, as the petitioner urges? Of a similar argument the Court of Appeals for the Third Circuit has said it

> "Approaches the transferral of a doctrine of attractive nuisance from children to seamen. With all reasonable solicitude for the welfare of those who work on the sea and its margins, we think it is going too far to say that a shipowner is negligent for leaving both light and heavy lumber within the reach of stevedores [longshoremen] because one of them might mistakenly use

the light for the purpose for which it should be plain that only the heavy is adapted." *Brabazon v. Belships,* 202 F. 2d 904, 907.

Before a rule is promulgated we suggest that the reasons for it be examined, as well as its impact upon other cases. In the case at bar the Court of Appeals said that the runner was owned, produced and fastened to the winch by the stevedore. See quote at page 5 of this brief. That statement in turn was based upon the verdict of the jury and in his brief in the Court below the petitioner conceded that his employer had breached a duty which it owed to him. For that breach there is a remedy under the Longshoremen's and Harbor Workers' Act, 33 U.S.C. 901 *et seq.*

III. The Proposition for Which the Petitioner Contends Would Nullify the Longshoremen's and Harbor Workers' Act and Stultify It to the Point Where the Stevedore Could Sue and Recover Against the Shipowner for the Stevedore's Own Negligence.

If a stevedore is a self-insurer, the rule for which the petitioner now contends would enable the stevedore to recover against the shipowner for the stevedore's own breach of duty to the longshoreman he employs. Where compensation is paid under an award, the right to bring the action is transferred to the employer. After the award only the employer may sue. 33 U.S.C. Sec. 933.

We therefore have the spectacle of a stevedore, who has by his own wrongful act injured one of his own employees, bringing a suit against the shipowner and recovering for the injury. There can be no logical distinction where the longshoreman sues and where his employer sues as the assignee of his employee's cause of action. If the duty, the breach and the injury exist, the judicially enforcible cause of action exists. *Cf. Pope & Talbot, Inc. v. Hawn,* 346 U. S. 406, where a negligent employer recovered back the sums it had paid for medical expense and as compensa-

tion. There, the payments were made voluntarily and not under an award.

It is not an answer to say that the shipowner can shift the risk by the purchase of insurance. The stevedore is also a businessman, operating for a profit, and he can likewise purchase insurance. The steamship interests have found that insurance carriers are not eleemosynary institutions. For each dollar of loss paid the insurance carrier must collect a dollar plus his operating expenses. We are advised that at the present time among the operating costs of a vessel such as the one here in question, the cost of insurance is exceeded only by the wages of the officers and crew.

IV. Alaska Steamship Company, Inc. v. Petterson, No. 287, October Term, 1953 Affirmed April 5, 1954, Was Wrongly Decided by the Court of Appeals for the Ninth Circuit in Its Decision, 205 F. 2d 478. All That Was Considered There Were Contentions as to Proof of Unseaworthiness and Control of That Portion of the Ship Upon Which the Injured Stevedore Was Working. Neither of These Points Reaches the Fundamental Issue.

An examination of the decision of the Court of Appeals for the Ninth Circuit in *Alaska Steamship Company v. Petterson*, No. 287, reveals that that Court appears to have considered only two points: unseaworthiness of the block, and the question of control of the place of work.

The ownership and the fact that the stevedore furnished the block which broke in the Petterson case seem to have played no part in the decision. True it is that in the *Petterson* case control of the place of work passed to the Stevedoring Company. More fundamental, however, were the facts that the block there was owned by the stevedore and furnished for use by him at the place of work which was under his control.

Where ownership of the offending thing and the furnishing of it are by an independent contractor, the facts

of control of the method of work and the place of work only furnish additional reasons why legal liability should be placed upon the one who has the three earmarks: ownership, furnishing and control. Control alone can be dispositive where the issue is negligence. Ownership and the furnishing of the instrumentality are dispositive where the issue is unseaworthiness. In the latter case, control is but an additional factor.

We think that rightly understood, the control doctrine pertains to conditions negligently created by the contractor during the course of the work he is performing for the owner, and it applies with full force to those who are upon the premises in the shoes of the contractor.

Where negligence is the test it is axiomatic that the definition of negligence is no different in the maritime law than elsewhere. In *Baltimore & Ohio S. W. R. Co. v. Carroll*, 280 U. S. 491 at 496, this Court said:

> "On the other hand, the charge in respect of the duty of the employer to furnish safe appliances was without qualification, and the jury might well have understood that the duty was an absolute one. That is not the law. The employer is not held to an absolute responsibility for the *reasonably safe condition of the place*, tools, and appliances, but only to *the duty of exercising reasonable care to that end*. Seaboard Air Line Ry. v. Horton, 233 U. S. 492, 502, 34 S. Ct. 635; Yazoo & M. V. R. Co. v. Mullins, 249 U. S. 531, 533, 39 S. Ct. 368". (Emphasis ours.)

An examination of the early cases shows that the rule originated as a common law rather than a maritime law doctrine and from its very beginning was stated in terms applicable to negligence. In *Hough v. Texas and Pacific R. R. Co.*, 100 U. S. 213, 226, 25 L. Ed. 612, this Court said:

> "One and, perhaps, the most important of those exceptions arises from the obligation of the master, whether a natural person or a corporate body, not to

expose the servant, when conducting the master's business, to perils or hazards against which he may be guarded by proper diligence upon the part of the master. To that end the master is bound to observe all the care which prudence and the exigencies of the situation require, in providing the servant with machinery or other instrumentalities adequately safe for use by the latter."

The Court of Appeals for the Eighth Circuit has stated the duty in the following terms:

"The duty of providing a reasonably safe place in which to work and reasonably safe appliances with which to work while a continuing one does not obligate the employer to keep the place of work safe at every moment where such safety may depend on the due performances of work by the servant and his fellow workmen. Kreigh v. Westinghouse, C., K. & Co., 214 U. S. 249. In fact the rule is held not to be applicable where the workmen in the progress of their work render the place unsafe (citing cases). Temporary conditions created by employees using or failing to use appliances furnished by the employer are not defects for which the employer may be held responsible in damages (citing cases)." *McGivern v. Northern Pac. Ry. Co.*, 132 F. 2d 213 at 217.

We would emphasize that in the cases just quoted the Court was dealing with a situation where the relationship of employer and employee existed. The question under discussion was the duty which the master owed to his servant. The cases establish, however, that even as between employer and employee the so-called duty of furnishing a "safe place to work" is defined in terms of reasonableness, and the duty devolved upon the person for the time being in control of the place where the accident occurred.

Given this duty upon the person in control of a place where work is being performed, it is fallacious then to

state the position of the owner *not* in control in terms of *avoidance* of liability. This we think is the fundamental flaw in the logic of petitioner's able counsel. If control of the place is in the contractor, it is *non sequitur* to argue that the owner not in control is attempting to avoid liability when he asserts that control, and therefore liability, is the contractor's. It is fundamental that a duty must exist before one can be charged with a breach of it and before an owner can be charged with liability for a condition arising while he is out of possession.

We must consider what duty he had. If he had no duty to supervise the method of work of the contractor, then he owed no duty to the contractor's employee injured by reason of a condition negligently created by the contractor during the course of the work. This is so because if the owner owed the duty of supervising the details of the work then by that fact alone the status of the contractor is changed to that of an employee.

> "An independent contractor may be distinguished from an agent in that he is a person who contracts with another to do something for him, but who is not controlled or subject to the control of the other in performance of such contract but only as to the result." 2 Am. Jur. 8.

We respectfully suggest that the control doctrine is but a subsidiary issue in the case at bar. The real question is: Who owned and who furnished the appliance, and what duty did he have to his employee to whom he furnished it? The petitioner contends that because the contractor furnished the appliance a duty was thereby created in the shipowner. That proposition is fundamentally wrong.

CONCLUSION.

We respectfully urge that the judgment of the Court below is right. This respondent originally took the position that it did not oppose the grant of certiorari in this case. It reiterates that position. The respondent here should be granted opportunity to file a brief in support of the decision of the Court below. We suggest that in view of the uncertainty following this Court's action in affirming the judgment in the *Petterson* case that certiorari should be granted here, that briefs and oral argument should be heard and that the judgment below should be affirmed.

Respectfully submitted,

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